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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1530

MARVIN HORAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Marvin Horan, hereinafter referred to as Horan, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, decided March 24, 1976, in Case No. 75-1779, styled United States of America vs. Marvin Horan, a/k/a Reverend Marvin Horan, which affirmed a judgment of the United States District Court for the Southern District of West Virginia at Charleston, entered April 18, 1975, in a criminal proceeding wherein Horan was found not guilty as charged in count two, four and five of the indictment, all related to the making and/or possession of destructive devices, i.e., dynamite

bombs, but was found guilty as charged in count one of the indictment, a conspiracy charge.

OPINIONS BELOW

The District Court rendered no formal opinions in the proceedings but the opinion of the Circuit Court of Appeals decided March 24, 1976, yet unreported, is attached to this Petition as a part of the appendix.

JURISDICTION

The decision of the Court of Appeals was rendered March 24, 1976, and this Petition is filed within thirty days of that day. This Courts jurisdiction is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the district judge invaded the province of the jury denying the petitioner a fair trial by giving the *Allen* charge, together with a command to reach a verdict.

2. Whether after some twenty-four hours of testimony extending over four trial days the district judge was warranted in recalling a jury only three hours into deliberations on his own motion to induce a verdict via the *Allen* charge.

3. Whether the effect of the *Allen* charge, the accompanying command to reach a verdict, and the timing of both coerced a verdict against the petitioner.

STATEMENT OF THE CASE

(a) Introduction

The Kanawha County (West Virginia) textbook protest received national attention in both 1974 and 1975.

This well known controversy developed as a result of the adoption and implementation of objectionable textbooks by the Kanawha County (West Virginia) Board of Education in 1974.

The protest movement to remove certain of these textbooks from the schools took various forms, including demonstrations, sit-ins, the keeping of children home from school, mass striking of workers, boycotting of various businesses, and, unfortunately, certain acts of violence.

Among the acts of violence, were included three dynamite bombings during October, 1974 of the Wet Branch Elementary School, the Midway Elementary School, and the Valley Grove Elementary School, all located in Kanawha County, West Virginia.

Subsequent to these bombings, a six count indictment was returned by the federal grand jury on January 17, 1975 (attached as part of the appendix). The following persons were charged in the indictment:

(1) LARRY ELMER STEPHENS—charged in five counts of the indictment. Convicted by jury on April 18, 1975 on all five counts. Trial co-defendant with Horan.

(2) DELBERT LEE ROSE—charged in five counts of the indictment; plead guilty to counts 1, 3, 4 and 6; used as a government witness.

(3) MELVIN D. DICKERSON, a/k/a Butch—charged in all six counts of the indictment; convicted by jury in June, 1975 at subsequent trial of counts 1, 2, and 3.

(4) JENNIE LYNN STEPHENS—charged in three counts of the indictment and convicted by a jury in June, 1975 at a subsequent trial of counts 1, 2, and 3.

(5) MICHAEL WAYNE BLANKENSHIP—charged in all six counts of the indictment; plead guilty to counts 1, 2, 4, and 5; used as a government witness against Horan and Larry Elmer Stephens.

(6) DARIUS IVAN PHILLIPS, a/k/a Popeye —unindicted co-conspirator, used as a government witness.

The petitioner, Marvin Horan, was charged in counts 1, 2, 3, 4 and 5 of the indictment.

Horan and his trial co-defendant Larry Elmer Stephens entered a plea of not guilty to all counts of the indictment and the trial began April 14, 1975 and continued for five days until April 18, 1975.

On April 18, 1975, on a Friday afternoon at approximately 3:55 p.m., the jury announced to the Court its verdict. Horan was found guilty as charged in count 1 of the indictment and innocent as to charges of counts 2, 4, and 5 of the indictment. Horan's trial co-defendant Larry Elmer Stephens was found guilty on all counts.

On May 19, 1975, Horan and Stephens were sentenced to imprisonment for a period of three years.

In June 11, 1975, Horan filed a motion for a new trial pursuant to Rule 33 of F.R.C.P. on the ground of newly discovered evidence. The motion of Horan included also a motion for an opportunity for an evidentiary hearing on his motion to present evidence and testimony.

The motion for a new trial was based upon an affidavit of Gregory Duane Crowder, an unknown independent third person, who over heard a member of the jury say that he or she was "pressured" into finding Horan guilty of count one because of the conduct of the judge in interrupting the deliberations of the jury and

the giving of the supplemental *Allen* charge commanding the jury to reach a verdict.

The name of the juror was enclosed in a sealed envelope.

On June 19, 1975, the Court denied the motion of Horan for a new trial on the ground of the above evidence of jury interference and further denied the defendant the opportunity to examine any jury or to present evidence in support of the motion.

(b) Trial Testimony

Prior to the trial, co-defendants, Michael Wayne Blankenship, Melvin D. Dickerson, Delbert Lee Rose, all plead guilty to various counts in the indictment and entered plea bargaining agreements with the United States and were used as government witnesses. The other co-defendant, Jeannie Lynn Stephens, was granted a severance, and was subsequently tried separately and convicted in June, 1975.

On April 14, 1975, Horan, together with his trial co-defendant, Larry Elmore Stephens, after entering pleas of not guilty stood trial on the charges as contained in the indictment.

The evidence produced against Horan was established solely through convicted co-defendants pursuant to the plea bargaining arrangement.

Delbert Lee Rose, testified about a certain unidentified discussion which took place on or about the middle of November, 1974. Rose testified that co-defendant, Larry Stephens and Horan were there together with others. Rose stated that there was a general discussion of explosive devices. Rose continued to say that there was a

discussion about what would happen if a sealed can of gasoline were placed on the boiler at Midway Elementary School. Rose said that Horan would furnish the gas can, and that he went to Horan's house to pick it up. However, on cross-examination, Rose admitted that he went to the door of the defendant, Marvin Horan, and asked that if he could "borrow" the gas can.

* * *

> Q. Now when you knocked on the door at Reverend Horan's house to ask for the gas can, what did you say to whomever answered the door?
>
> A. I can't remember the exact words. Marvin came to the door. I ask him if he had a gas can I could borrow. I can't remember really—I can't remember whether I told him my car was out of gas or I wanted it to carry extra gas. I can't remember the exact words.

* * *

There was, however, no evidence that the gas can was ever used for anything, except that Rose did use the gas can as he indicated to obtain gas for his car.

Rose continued his testimony and stated that Horan had told him that the state law required the school to have a hot lunch program, and if the cafeteria were out of operation, that they would automatically have to shut the school down.

Also, Rose testified that he had a discussion of the Bible with Horan, and that Horan had read several passages out of the Bible. Rose couldn't remember the words exactly but said it related to the passage about there being "a time and place for all things." Also, Rose stated that Horan read a passage relating to war and

the fact that Horan stated "be not afraid for the Lord thy God is with thee."

When asked by the government what those Bible passages meant to him, Rose subjectively stated that "it meant to me to not be afraid of whatever we would do in the fight against the books." On direct examination by the government, Rose added that on the same evening, Horan stated "that he figured that he had paid enough taxes in the last ten years that Midway School belonged to him and that we had his permission to do anything we wanted to do to it."

Later, Michael Wayne Blankenship, testified that he talked to Jennie Stephens, wife of trial co-defendant, Larry Stephens, and asked her for Twenty Dollars ($20.00) for some "stuff." Blankenship went on to testify that Marvin Horan gave Jennie Stephens the Twenty Dollars ($20.00).

After Horan had given the money to Jennie Stephens, he asked Blankenship what the money was for. Blankenship vaguely testified that he said it was something that he wouldn't want to get caught with.

In a surprise move, and contrary to an earlier assurance of the United States Attorney, the government moved to have the grand jury testimony of Horan read to the jury.

At the earlier hearing on pre-trial motions, the government represented that the grand jury testimony of Horan would not be used in the government's case in chief. Moreover, the government admitted that such assurance was made and that it was not surprised by any turn of the evidence to warrant a change in the assurance.

Nevertheless, the Court granted the motion of government to have the grand jury testimony of Horan read to the jury. Horan moved for a mis-trial on the ground of prosecutorial misconduct.

Also, the government moved the admission of a taped excerpt of a speech which Horan made on April 5, 1975, some nine days prior to the beginning of the trial.

The excerpt from the speech is as follows:

> "God has called upon his ministers today—Reverend Graley, Hill, and myself, as well as other ministers throughout the valley—to bring the sins to the attention of the world. The world has listened to the message. They are condemned. They know what wrong. And friends, I don't care what the law says, when we blaspheme God, it is wrong; and if going to jail over it, I'll go. Thats all there is to it."

The district judge initially overruled the motion of the government to introduce this taped excerpt into evidence on the ground that it was not material. Subsequently, however, the excerpt of the above speech was allowed in evidence as rebuttal testimony.

Neither Horan or trial co-defendant Stephens took the stand.

In his defense, Horan called Arthur Rose who testified that Delbert Lee Rose actually used the gas can he got from Horan to get some gasoline out of his car because his car was out of gas.

Also, a Mr. Richard D. Bright testified that Horan ran a rally on the night of the alleged meeting at the textbooks headquarters and that he went past the textbook headquarters at approximately 10:30 or 11:00 o'clock and that there was a huge crowd outside. He

did not see Horan at the textbook headquarters. There was also a similar testimony from JoAnn Burdette.

Then came Billy L. Pauley, a local Mayor, who testified that Horan had on many occasions been instrumental in curbing violence and keeping the peace in the textbook protest.

After the reading of the aforementioned excerpt of the Horan speech to the jury, all parties rested and closing arguments followed.

Following four days of testimony (some 24 hours in all), the district judge convened the Court on the fifth day at 9:30 a.m. One minute later, the jury retired from the courtroom to begin their deliberations regarding Horan and trial co-defendant Stephens.

At approximately 11:52 a.m., the district judge received an inquiry from the foreman of the jury, wanting to see a copy of the grand jury statement of Horan.

The district judge denied the request and excused the jury for lunch.

Upon returning from lunch at 1:30 p.m., the jury resumed their deliberations.

At 2:37 p.m., in the afternoon (Friday), approximately one hour after the jury returned from lunch, the district judge, on his own motion, summoned the jury back to the courtroom and inquired whether they had agreed upon a verdict yet.

The foreman of the jury responded that they had not yet reached a verdict.

The district judge thereupon began to give his own version of the supplemental *Allen* charge, but a sidebar was called by the attorney for the United States.

At the sidebar, there was a discussion regarding the form of the supplemental charge which the district judge was preparing to give.

The United States Attorney offered the district judge a substitute charge which the district judge chose.

Characteristically, the district judge emphatically stated to those present "I think this jury ought to come to a verdict of some kind."

Thus, after only some three hours and nineteen minutes of actual deliberation, the district judge proceeded to give a supplemental *Allen* charge to the jury solely for the purpose of inducing a verdict, although no difficulty or deadlock had been indicated.[1]

---

[1]THE COURT: Ladies and gentlemen of the jury, I want you pay close attention to this instruction.

As the Court has previously instructed you, in order to return a verdict in this case, each juror must agree thereto, and in considering your verdicts, jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to a juror's individual judgment.

Each juror must decide the case for himself, but this should be done only after an impartial consideration of the evidence with his fellow jurors. In the course of the deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous. However, no juror should surrender his honest conviction as to the weight or effect of the evidence solely or for the mere purpose of returning a verdict.

Each of you who finds himself in the minority should reconsider your views in the light of the opinions of the majority; on the other hand, each juror who finds himself in the majority should give equal consideration to the views of the minority.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

The function of the jury is to determine the facts. This should be done without prejudice, fear or favor, and solely from a fair consideration of the evidence. This must be decided only on the evidence you heard from the witness stand, and the exhibits that are part of the evidence, and not from anything else. The evidence should be considered and viewed by you in the light of your own observations and experiences in the ordinary affairs of life.

I further charge you that there is nothing more important in the

(Footnote continued on next page)

Significantly, the Court concluded the above charge with a command to the jury:

> "I would like for you to go back to your jury room, *agree upon verdicts, and return to the courtroom.*" (Emphasis added)

One hour and nineteen minutes later, the jury returned a verdict of guilty of one count and acquittal of three counts as to Horan, and convicted co-defendant, Stephens, of all five counts.

REASONS FOR GRANTING THE WRIT

A. Conflict Within The Circuit Court of Appeals

Horan urges this Court to grant the writ sought in this petition for the reason that there is a growing and serious discontent, as well as confusion and often bitter conflict among the circuits with regard to the form, the variations of that form, the timing and delivery of the supplemental *Allen* charge to the jury.

This confusion and conflict have reached epidemic proportions. Many circuits have cried out to this Court for uniform national standard of application of the *Allen* charge, and have actually urged its abolishment. As a panel of the Fifth Circuit stated in *United States*

(Footnote continued)

world today than that you and I do our sworn duty to see that these defendants get a fair and full trial, and that the government likewise gets a fair and full trial. You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" pleas of both accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by conjecture, surmise, sympathy, speculation, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, and follow the law as stated by the Court.

I would like for you to go back to your jury room, agree upon verdicts, and return to the courtroom.

You may go now. (App. 155-157)

v. Bailey, 468 F.2d 652 (5th Cir. 1972), quoting the words of the dissent in *Walker* v. *United States*, 342 F.2d 22 at 28-29:

> "It was the judges who first thought of the idea of the dynamite charge. It ought to be the judges who put an end to it in a quick and not too decent a burial."

The circuits have repeatedly grappled with the faults of the *Allen* charge and the number of cases are legion, and seem to be increasing at an alarming rate. Indeed, the charge has caused so much difficulty that the American Bar Association has recommended that the *Allen* charge be replaced, and that the supplemental *Allen* charge only be given in a situation where a jury has become deadlocked. American Bar Association, *Standards Relating to Trial by Jury*, 145-46 (1968).

The following is a synopsis of the varying treatment accorded the *Allen* charge among the circuits and graphically indicates the confusion and conflicts which have occurred and continue to occur with the application of this most unmanageable of all jury charges:

(1) The District of Columbia Circuit has exercised its supervisory jurisdiction and has abolished the supplemental *Allen* charge and has replaced it with the ABA standard. See *United States* v. *Thomas*, 1971, 146 U.S. App. D. C. 101, 449 F.2d, 1177, 1187 (en banc).

(2) The First Circuit has stated that the *Allen* charge should be used with great caution and only when "absolutely necessary". *United States v. Flannery*, 451 F.2d 880, 883.

(3) The Second Circuit has "grave doubts" about the supplemental *Allen* charge and has given notice that it will not tolerate the slightest deviation from the approved language; it has further

stated that it will permit *Allen* to stand only by the "barest margin". See *United States* v. *Kenner*, 354 F.2d 780 (1965).

(4) The Third Circuit has flatly abolished the supplemental *Allen* charge in any form. "Hereafter this Court will not let a verdict stand which may have been influenced in any way by an *Allen* charge." *United States* v. *Fioravanti*, 412 F.2d 407 (1969).

(5) The Fourth Circuit has, as in the instant appeal, stated that it views the giving of the supplemental *Allen* charge, sua sponte, to be such a threat to the province of the jury that it pays very close scrutiny to the charge. See also, *United States* v. *Rogers*, 289 F.2d 433 (1961).

(6) The Fifth Circuit has most reluctantly upheld the supplemental *Allen* charge, but has urged its "death". *United States* v. *Bailey*, 468 F.2d 652 (1972).

(7) The Sixth Circuit has reversed convictions upon the slightest addition to or deviation from the *Allen* charge. See, *United States* v. *Harris*, 391 F.2d 348 (1968).

(8) The Seventh Circuit has abolished the *Allen* charge and has accepted strict application of the ABA recommendation. *United States* v. *Brown*, 411 F.2d 930 (1969).

(9) The Eighth Circuit allows only the unadulterated recitation of the Supreme Court's paraphrase of the trial court's charge in *Allen* and reading the "second paragraph" to the jury is prohibited. See, *Chicago & E. I. Ry.* v. *Sellars*, 5 F.2d 31 (1925).

(10) The Ninth Circuit allows a supplemental instruction that is confined to simply telling the jury to keep trying. See, *Wash* v. *United States*, 371 F.2d 135 (1967).

(11) The Tenth Circuit "cautiously" approves *Allen* but finds reversable error for any or the slightest deviation from the approved language. See *Goff* v. *United States*, 446 F.2d 623 (1971).

Moreover, this Court should certainly be aware of the large number of States which have joined the growing trend of abolishing the supplemental *Allen* charge. Arizona has flatly abondoned the *Allen* charge in its entirety. *State* v. *Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959); Montana has also put *Allen* to rest. *State* v. *Randall*, 137 Mont. 534, 353 P.2d 1054 (1969); Kansas, Idaho and Iowa have disapproved of and discouraged *any* use of the dynamite charge. See *Eikmeier* v. *Bennett*, 143 Kan. 888, 57 P.2d 87, 92 (1936); *State* v. *Moon*, 20 Idaho 202 (117 P. 757) (1911); and *Middlestates Util. Co.* v. *Incorporated Tel. Co.*, 222 Iowa 1275, 271 M.W. 180 (1937).

The aforementioned confusion, distress, and conflict among the federal circuit courts which have dealt with the question of the propriety and use of the supplemental *Allen* charge clearly indicates and poignantly demonstrates the need for this Court to come to terms with the administration and application of the supplemental *Allen* charge in its supervisory capacity.

The need for this Court to take some action is also and more acutely necessary as in the present situation where the trial judge gives the dynamite charge to the jury, sua sponte, without any indication of deadlock or difficulty whatsoever. The giving of the supplemental *Allen* charge, sua sponte, is perhaps the greatest area of abuse as found by the appellate courts.

At a minimum, this Court should grant this petition to at least provide some uniform standards which would

warrant the giving of the supplemental *Allen* charge by a trial judge where no deadlock or difficulty has been experienced by the jury, and the deliberation of the jury was only hours old.

B. Important Questions of Federal Law Which Should be Settled by This Court.

The instant petition presents an important question of federal law which should and must be settled by this Court.

The problem facing a trial judge when a jury is seemingly unable to reach a verdict, or has become deadlocked, or where the jury may be deliberating too long, in his opinion, is by no means a new problem.

It has been reported that Fourteenth Century jurists devised perhaps the most effective solution—deadlocked jurors were locked into an oxcart and carried about with the judge while he rode circuit and were permitted to leave the cart only when a verdict was reached. Crabb, *History of English Law*, 287 (1829); cited in Note, 31 U. Chi. L. Rev. 386 n. 1 (1964). Jurors were said to be "kept without meat, drink, fire or candle, unless by permission of the judge, till they were all unanimously agreed." *People* v. *Sheldon*, 156 N. Y. 268, 50 N.E. 840, 842 (1898).

Similarly, judges have seen fit to deal with recalcitrant jurors by requiring the jurors to deliberate throughout the night, *Commonwealth* v. *Moore*, 398 Pa. 198, 157 A.2d 65 (1959); by threatening to lock up the jurors from Friday until Monday morning, *Erwin* v. *Hamilton*, 50 How. Pr. 32 (N. Y. 1875); by threatening to deprive the jurors of food from Saturday until Monday, *Cole* v. *Swan*, 4 Gren 32 (Iowa 1853); and by threatening to

deprive the jury in the dead of winter of water and heat until they continued to deliberate, *Needy* v. *City of Richland Center,* 237 Wis. 537, 297 N.W. 419 (1941).

However, the more subtle technique was found to be the giving of supplemental instructions which exhorted the jury to arrive at a verdict. Such supplemental instructions were said to be "familiar practice" and the use was approved by this Court in 1894. *Allis* v. *United States,* 1894, 155 U.S. 117, 123; 15 S.Ct. 36, 39; L.Ed. 91, 94. It was two years later, however, when this Court expounded the case that was to become the wellspring from which all future judges withdrew the solution to jury deadlocks and jury difficulties. This, of course, was *Allen* v. *United States,* 164 U S. 492; 17 S.Ct. 154, 41 L.Ed. 528 (1896).

That the *Allen* case was to become this wellspring of all modern law regarding seemingly deadlocked juries is perhaps its greatest anomaly.

Alexander Allen was a fourteen year-old "colored boy" who had been convicted of the murder of another youth in the Cherokee Nation. Previously, Allen had been convicted of murder in 1892, but this Court reversed that conviction due to faulty jury instruction concerning justification or excuse for homicide. 150 U.S. 551 (1893). Allen was again tried and again convicted, but once more this Court overturned his conviction because of a defect in a jury instruction regarding self defense. 157 U.S. 675, 15 S.Ct. 720, 39 L.Ed. 854 (1894).

Allen was tried and convicted yet a third time. Again this case found its way to this Court and when the third decision was handed down, the following terse sentence headlined the Court's decision: "*No counsel for plaintiff*

in error [Alexander Allen]" 164 U.S. 494, 17 S.Ct. 154, 41 L.Ed. 528.

Equally perplexing, the opening paragraph of the Court's opinion began,

> "We are somewhat embarrassed in the consideration of this case by the *voluminousness of the charge* . . . as well as the *absence of a brief* on the part of the plaintiff in error." Id at U.S. 494. (Emphasis added)

Nevertheless, this Court then went on to affirm the conviction and to an analysis of the propriety of the original "Allen charge" as follows:

> "There was no error in these instructions." Id at U.S. 502

The original *Allen* case thus abounded with its own pecularities and there is little wonder that many doubt whether this case would not be decided differently today. (See, *Thaggard* v. *United States,* 354 F.2d at 739)

Not surprisingly, then, the *Allen* charge has generated more cases and more appeals than any other single principle in modern law. (ABA, *Standards Relating to Trial by Jury* (1968)

Judge Wisdom did not exaggerate at all when he said:

> "The *Allen* charge causes more trouble in the administration of justice than it is worth. Its time-saving merits in the district court are more than nullified by the complications it causes on appeal . . . 'Like Banquo's ghost, it would not remain at rest,' Justice Udall, dissenting in *State* v. *Voeckell,* 69 Ariz. 145, 210 P.2d 972 (1949). And in this Circuit, the ghost seems especially restless." *Andrews* v. *United States,* 309 F.2d 127 at 129 (5th Cir. 1962)

The supplemental *Allen* charge, its timing, and the variations of it, has been the subject of many legal commentators. The overwhelming weight of legal comments have been in opposition to the *Allen* charge. The objections primarily have been:

(1) It is coercive of minority jurors;

(2) It gives the trial judge undue influence;

(3) It may include language which forces a jury which may be justifiably deadlocked into a hasty verdict; and

(4) It ignores practical considerations regarding hung juries.

One commentator has asserted that the *Allen* charge "seems to play havoc with basic theories of our system of justice." Comment, "The *Allen* Charge: Dead Law a Long Time Dying," 6 *San. Fran. L. Rev.* 326, 329 (1972). He adds:

> "The fact that the Court takes care to point out that the recalcitrant minority may stand either for conviction or for acquittal cannot alter the fact that the thrust of the charge is to put pressure on the dissenters. This weight of judicial pressure, combined with the pressure already being exerted by the majority jurors, may induce a doubting juror to relinquish his position and accept the instruction as an invitation to allow the majority to rule."

Another commentator has voiced a similar criticism:

> "Instructing a criminal jury to doubt the correctness of the judgment which was not concurred in by the majority, to listen with deafness to the majority, and to reconsider his position accordingly dilutes the standard of proof beyond a reasonable doubt. The thrust of the charge admonishes the dissenting jurors that the return of the unanimous verdict depends upon their assent to the majority position—a consideration having no evidentiary basis and absent an instruction that a generally deadlocked verdict is permissible, intimates that the trial will not end until a verdict of either guilty or not guilty is returned." Comment, "Instructing the Deadlocked Jury: Some Practical Considerations," 8 *John Marshall Journ. of Practice and Procedure*, 169, 174-75 (1974)

The role of the trial judge also has an effect upon the impact of the *Allen* charge. One commentator has stated:

> "Because the *Allen* instruction comes from the bench, the pressure on a hold-out juror is even greater. The judge is a symbol of the law—of all who confront the jury—he demands the greatest respect, and rightly so. He also is in the greatest position to influence a jury. Jurors preceive the judge as an expert and rely heavily on his direction during a trial. As Mr. Chief Justice Fuller stated in *Starr* v. *United States*:
>
> > "It is obvious under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his lightest word or intimation is received with deference, and may prove controlling." (Emphasis added)

The above comment has particular significance with regard to the instant petition. The type of language used by the trial judge in the present case—"I would like for you to go back to your jury room, *agree upon verdicts*, and return to the courtroom," has been attacked by courts and commentators alike. One commentator has pointed out that:

> "The addition of certain elements not present in the approved *Allen* formulation has been found to render the charge coercive. Thus, instructions containing warnings that the jury has 'got to reach a verdict,' (*Jenkins* v. *United States*, 380 U.S. 445 (1965), have been rejected. Note, "Due Process, Judicial Economy, and The Hung Jury: A Re-examination of the *Allen* Charge," 58 *Va. L. Rev.* 123, 129 (1967)

The possible effect of the last sentence of the charge in the instant petition—"I would like for you to go back to your jury room, *agree upon verdicts,* and return to the courtroom"—and similar additions to the *Allen* charge have been discussed. Comment, "The *Allen* Charge: Recurring Problems in Recent Developments," 47 *N. Y. U. L. Rev.* 296, 303-04 (1972)

Also, the time or the timing factor as in the present petition is significant. One commentator has stated:

> "The length of time following the reading of the instruction to the deadlocked jury and the return of its verdict may also be cited to underscore the coercive effect of the supplemental instruction. Where a jury has been unable to agree on a verdict for a length of time and a verdict is returned shortly after a supplemental instruction is given, the circumstances may be said to sustain the inference that the instruction had a coercive effect —that the jury misinterpreted the instruction as an order by the Court to come to an agreement.
>
> It may also be urged on appeal that the supplemental instruction, by not containing offensive language, had a course of effect in that the charge was given too soon after the jury had commenced deliberations, or, as frequently occurs, that the instruction was given sua sponte by the trial court before the jury had reported its inability to agree. When the instruction is determined to be given too soon after the jury has commenced its deliberation, the Court has interfered with the independent deliberation of the jury. The action of the trial court may be preceived by the jurors as a cue by the judge that their verdict is overdue. 8 *John Marshall Journ.*, supra. at 184-85 (Emphasis added)

Thus, in view of the above cited cases and legal commentaries, it is clear that this Court should accept its responsibility and to determine, once and for all, whether the supplemental *Allen* charge is to be given, and if it is to be given, when it is to be given, and what it should and should not contain. This Court should rule with preciseness and with sufficient clarity to guard against the continued abuses.

C. Conflict With Decisions of This Court.

The petitioner asserts that the decision of the Circuit Court in this matter is at odds with the decision of this Court in *Jenkins* v. *United States*, 380 U.S. 445 85 S.Ct. 1059, 13 L.Ed. 2d (1965).

In the *Jenkins* case, this Court held that any statement to the effect that the jury had to reach a decision was coercive and that the conviction should be reversed.

As this Court stated:

> "Of course, if this Court should conclude that the Judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coerced in the surrendering views conscientiously held is so clear as to require no elaboration."

In the instant petition, the words of the Court at the conclusion of the supplemental *Allen* charge given only after some three hours and nineteen minutes of deliber-

ation following over twenty-four hours of trial testimony, —"I would like for you to go back to your jury room, *agree upon verdicts, and return to the courtroom,* is, in and of itself a coercive statement in view of circumstances and facts of this matter.

It is submitted that the judicial command "agree upon verdicts" and "return to the courtroom" is tantamount to commanding the jury to reach a verdict and is coercive as this Court has held in *Jenkins* v. *United States,* supra.

CONCLUSION

For the reasons assigned herein, the petitioner prays that the writ of certiorari should be granted and the writ issued to review the judgment order entered by the Fourth Circuit Court of Appeals.

Respectfully submitted,

JOHN BOETTNER, JR.
Attorney at Law
1022 Charleston National Plaza
Charleston, West Virginia 25301
Telephone: 304/342-4191

CERTIFICATE OF PROOF OF SERVICE

I, JOHN BOETTNER, JR., Attorney for Petitioner, MARVIN HORAN, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has been deposited in the United States Mail, postage prepaid, air mail, certified, properly addressed to Respondent's Counsel, THE SOLICITOR GENERAL, United States Department of Justice, Washington, D. C. 20530, on this, the 3rd day of May, 1976.

JOHN BOETTNER, JR.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA JANUARY, 1975 SESSION, CHARLESTON

UNITED STATES OF AMERICA

v.

LARRY ELMER STEVENS
MICHAEL WAYNE BLANKENSHIP
MARVIN HORAN, also known as
Reverend Marvin Horan
JEANNIE LYNN STEVENS
MELVIN D. DICKERSON,
also known as Butch
DELBERT LEE ROSE

No. 75-10CH

18 U.S.C., Sec. 371—Ct. 1
18 U.S.C., Sec. 2—Cts. 2, 3, 4, 5 & 6
18 U.S.C., Sec. 844(f)—Ct. 4
26 U.S.C., Sec. 5861(f)—Cts. 2 & 5
26 U.S.C., Sec. 5861(d)—Cts. 3 & 6
26 U.S.C., Sec. 5871—Cts. 2, 3, 5 & 6

The Grand Jury charges:

COUNT ONE

1. From on or about the 1st day of October, 1974, until on or about the 15th day of November, 1974, in Kanawha County, West Virginia, and within the Southern District of West Virginia, LARRY ELMER STEVENS, MICHAEL WAYNE BLANKENSHIP, MARVIN HORAN, also known as Reverend Marvin Horan, JEANNIE LYNN STEVENS, MELVIN D. DICKERSON, also known as Butch, and DELBERT LEE ROSE, the defendants herein, and Darius Ivan Phillips, also known as

Popeye, named herein as a co-conspirator, but not as a defendant, unlawfully, wilfully and knowingly did combine, conspire confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, that is:

To unlawfully and maliciously damage and destroy, and attempt to damage by means of firearms, that is, destructive devices, being dynamite bombs, the Midway Elementary School, the Valley Grove Elementary School, and other property owned, possessed and used by the Kanawha County Board of Education, Kanawha County, West Virginia, an institution and organization receiving Federal financial assistance; in violation of Title 18, United States Code, Section 844(f).

2. In carrying out the aforesaid object of this conspiracy, the defendants, co-conspirators, and divers other persons whose names are to the Grand Jury unknown:

(a) Did unlawfully, wilfully and knowingly make firearms, that is, destructive devices being dynamite bombs, in violation of the provisions of Title 26, United States Code, Section 5861(f).

(b) Did unlawfully, wilfully and knowingly receive and possess firearms, that is, destructive devices being dynamite bombs, which were not registered in the National Firearms Registration and Transfer Record; in violation of Title 26, United States Code, Section 5861(d).

3. It was further a part of this conspiracy that the defendants would use the firearms, that is, destructive devices being dynamite bombs, to blow up, damage, and destroy the aforesaid Midway Elementary School, the Valley Grove Elementary School, and other property

which was owned by the Kanawha County, West Virginia Board of Education.

4. At or about the times and places hereinafter mentioned, the defendants committed the following and other overt acts in furtherance of this conspiracy and to effect the objects thereof:

(a) On or about October 18, 1974, LARRY ELMER STEVENS contacted MICHAEL WAYNE BLANKENSHIP regarding the acquisition of certain explosive components, that is, safety fuse and non-electric blasting caps.

(b) On or about October 19, 1974, MICHAEL WAYNE BLANKENSHIP contacted Darius Ivan Phillips, also known as Popeye, and requested certain explosive components, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse.

(c) On or about October 19, 1974, Darius Ivan Phillips, also known as Popeye, in the company of MICHAEL WAYNE BLANKENSHIP, delivered certain explosive components, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse, to the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia.

(d) On or about October, 1974, in a back room of the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, MARVIN HORAN, also known as Reverend Marvin Horan, gave JEANNIE LYNN STEVENS Twenty Dollars ($20.00) for the purchase of certain explosive components, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse.

(e) On or about October 19, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County,

West Virginia, JEANNIE LYNN STEVENS gave Twenty Dollars ($20.00) to MICHAEL WAYNE BLANKENSHIP for the purchase of certain explosive components, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse.

(f) On or about October 19, 1974, outside the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, MICHAEL WAYNE BLANKENSHIP paid Darius Ivan Phillips, also known as Popeye, Twenty Dollars ($20.00) for the certain explosive components, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse.

(g) On or about October 19, 1974, outside the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, Darius Ivan Phillips, also known as Popeye, delivered to JEANNIE LYNN STEVENS at or near the Key Market parking lot, Campbells Creek, Kanawha County, West Virginia, certain explosive materials, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse.

(h) On or about October 19, 1974, JEANNIE LYNN STEVENS transported in a black and maroon Chevelle automobile from at or near the Key Market parking lot, Campbells Creek, Kanawha County, West Virginia, certain explosive components, that is, approximately five (5) non-electric blasting caps and approximately twenty (20) feet of safety fuse, to the residence of her and her husband, LARRY ELMER STEVENS, at 670B Campbells Creek Drive, Kanawha County, West Virginia.

(i) On or about October 19, 1974, LARRY ELMER STEVENS transported in a black and maroon Chevelle

automobile certain explosive components, that is, approximately five (5) blasting caps and approximately twenty (20) feet of safety fuse, from his residence at 670B Campbells Creek Drive, Kanawha County, West Virginia, to the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia.

(j) In or about the middle of October, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, a conversation was held among LARRY ELMER STEVENS, MARVIN HORAN, also known as Reverend Marvin Horan, DELBERT LEE ROSE, Arthur Rose, and divers other persons whose names are to the Grand Jury unknown, which conversation concerned the destroying of the Midway Elementary School by placing a full, sealed five-gallon can of gasoline on the furnace boiler of the Midway Elementary School and allowing it to explode when the temperature of the furnace rose high enough. During this conversation, MARVIN HORAN, also known as Reverend Marvin Horan, volunteered the use of his five-gallon gasoline can for the aforesaid destruction of the Midway Elementary School.

(k) In or about the middle of October, 1974, at the residence of MARVIN HORAN, also known as Reverend Marvin Horan, on Campbells Creek, Kanawha County, West Virginia, MARVIN HORAN, also known as Reverend Marvin Horan, gave to DELBERT LEE ROSE a red five-gallon gasoline can and instructed DELBERT LEE ROSE to wipe the fingerprints off of it.

(l) On or about October 21, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, MARVIN HORAN, also known as Reverend Marvin Horan, in the presence of LARRY ELMER

STEVENS, DELBERT LEE ROSE, Arthur Rose, and divers other persons whose names are to the Grand Jury unknown, made inflamatory statements, including but not limited to the following: (1) That according to the Bible there is a time to live and a time to die and that one must fight fire with fire; a time to kill and a time to be killed; a time for love and a time for hate; a time for war and a time for peace; (2) that he, MARVIN HORAN, also known as Reverend Marvin Horan, had paid taxes for the last ten years and that he had paid enough taxes to own the Midway Elementary School, that he considered the Midway Elementary School his, that the persons present had his permission to do anything they wanted to with the Midway Elementary School; (3) and according to the law there has to be a hot lunch program in the school and if the cafeteria at the Midway Elementary School was shut down, there could be no school held; or words to that effect.

(m) In or about the early morning hours of October 22, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS, MELVIN D. DICKERSON, also know as Butch, and DELBERT LEE ROSE had a conversation concerning the dynamiting of the Midway Elementary School on Campbells Creek, Kanawha County, West Virginia.

(n) In or about the early morning hours of October 22, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS, MELVIN D. DICKERSON, also known as Butch, and DELBERT LEE ROSE made a firearm, that is, a destructive device, being a bomb, consisting of approximately five (5) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse.

(o) In or about the early morning hours of October 22, 1974, LARRY ELMER STEVENS transported DELBERT LEE ROSE in a black and maroon Chevelle automobile, to the vicinity of the Midway Elementary School, Campbells Creek, Kanawha County, having in their possession a firearm, that is, a destructive device, being a bomb, consisting of approximately five (5) sticks of dynamite, and one (1) non-electric blasting cap, and five (5) feet of safety fuse.

(p) In or about the early morning hours of October 22, 1974, LARRY ELMER STEVENS instructed DELBERT LEE ROSE to throw the firearm, that is, a destructive device, being a bomb, consisting of approximately five (5) sticks of dynamite, and one (1) non-electric blasting cap, and five (5) feet of safety fuse into the cafeteria of the Midway Elementary School, Campbells Creek, Kanawha County, West Virginia.

(q) In or about the early morning hours of October 22, 1974 DELBERT LEE ROSE, after lighting the fuse, threw a firearm, that is, a destructive device, being a bomb, consisting of approximately five (5) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse into a classroom of the Midway Elementary School, Campbells Creek, Kanawha County, West Virginia.

(r) At approximately 3:40 a.m. on October 22 1974, a firearm, that is, a destructive device, being a bomb, consisting of approximately five (5) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, exploded in a classroom of the Midway Elementary School, Campbells Creek, Kanawha County, West Virginia.

(s) On or about October 11, 1974, outside the anti-

textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS, MELVIN D. DICKERSON, also known as BUTCH, and DELBERT LEE ROSE had a conversation about why DELBERT LEE ROSE had put the bomb in a classroom of the Midway Elementary School instead of its cafeteria.

(t) In or about the early part of November, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, in the presence of LARRY ELMER STEVENS, MICHAEL WAYNE BLANKENSHIP, DELBERT LEE ROSE, Michael Ray Moles, and divers other persons whose name are to the Grand Jury unknown, LARRY ELMER STEVENS, MICHAEL WAYNE BLANKENSHIP, and DELBERT LEE ROSE had a conversation concerning the destroying of Valley Grove Elementary School, Kanawha County, West Virginia, by the use of explosives.

(u) On or about November 9, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS, MELVIN D. DICKERSON, also known as Butch, and others whose names are to the Grand Jury unknown, did make a firearm, that is, a destructive device, being a bomb, which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse.

(v) On or about November 11, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS delivered to DELBERT LEE ROSE a firearm, that is, a destructive device, being a bomb, which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse.

(w) On or about November 11, 1974, at the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS instructed DELBERT LEE ROSE to use a firearm, that is, a destructive device, being a bomb, which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, to destroy and damage the Valley Grove Elementary School, Kanawha County, West Virginia.

(x) On or about November 11, 1974, DELBERT LEE ROSE transported a firearm, that is, a destructive device being a bomb which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, from the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, to along West Virginia Secondary Route 114, North, Elkview Section of Kanawha County, West Virginia, where DELBERT LEE ROSE disposed of said firearm in order to conceal it from law enforcement authorities.

(y) On or about November 12, 1974, LARRY ELMER STEVENS and Dale Chapman along West Virginia Secondary Route 114, North, Elkview Section of Kanawha County, West Virginia, did attempt to locate a firearm, that is, a destructive device, being a bomb, which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse.

(z) In or about the latter part of November, 1975, outside the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS and DELBERT LEE ROSE had a conversation about obtaining explosive components and devices.

(aa) On or about December 2, 1974, at or near the Key Market parking lot, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS contacted and had a conversation with MICHAEL WAYNE BLANKENSHIP about obtaining explosive components and devices from Darius Ivan Phillips, also known as Popeye.

(bb) On or about December 2, 1974, outside the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, LARRY ELMER STEVENS received an unknown amount of money from MARVIN HORAN, also known as Reverend Marvin Horan.

(cc) On or about December 2, 1974, LARRY ELMER STEVENS, MICHAEL WAYNE BLANKENSHIP and Charles Wayne Bostic drove to the residence of Darius Ivan Phillips, also known as Popeye, on Campbells Creek, Kanawha County, West Virginia.

(dd) On or about December 2, 1974, at the residence of Darius Ivan Phillips, also known as Popeye, Darius Ivan Phillips, also known as Popeye, declined to sell any explosive components and devices to MICHAEL WAYNE BLANKENSHIP.

(ee) And other overt acts.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

In or about the early morning hours of October 22, 1974, at or near the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, and within the Southern District of West Virginia, LARRY ELMER STEVENS, MICHAEL WAYNE BLANKENSHIP, MARVIN HORAN, also known as Reverend Marvin Horan, MELVIN D. DICKERSON, also known as Butch, and DELBERT LEE ROSE, aided and abetted by one another, did unlawfully, wilfully, and knowingly make and cause to be made a firearm, that is, a destructive device, being a bomb, consisting of approximately five (5) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, without having complied with the provisions of Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Section 5861(f) and 5871, and Title 18, United States Code, Section 2.

COUNT THREE

In or about the early morning hours of October 22, 1974, at or near the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, and within the Southern District of West Virginia, LARRY ELMER STEVENS, MELVIN D. DICKERSON, also known as Butch, and DELBERT LEE ROSE, aided and abetted by one another, did unlawfully, wilfully, and knowingly possess a firearm, that is, a destructive device, being a bomb consisting of approximately five (5) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, which was not registered to them or to any of them, in the National Registration and Transfer Records as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5681(d) and 5871, and Title 18, United States Code, Section 2.

COUNT FOUR

In or about the early morning hours of October 22, 1974, at the Midway Elementary School, Campbells Creek, Kanawha County, West Virginia, and within the

Southern District of West Virginia, DELBERT LEE ROSE, aided and abetted by LARRY STEVENS, MICHAEL WAYNE BLANKENSHIP, MARVIN HORAN, also known as Reverend Marvin Horan, JEANNIE LYNN STEVENS, and MELVIN D. DICKERSON did unlawfully and maliciously damage and destroy, and attempt to damage and destroy, and cause same by means of an explosive, that is, a destructive device, being a dynamite bomb, a building and other personal and real property, that is, the Midway Elementary School, Campbells Creek, Kanawha County, West Virginia, which was owned, possessed and used by the Kanawha County West Virginia, Board of Education, an institution and organization receiving Federal financial assistance; in violation of Title 18, United States Code, Sections 884(f) and 2.

COUNT FIVE

On or about the 9th day of November, 1974 at or near the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, and within the Southern District of West Virginia, LARRY ELMER STEVENS, MICHAEL WAYNE BLANKENSHIP, MARVIN HORAN, also known as Reverend Marvin Horan, MELVIN D. DICKERSON and other persons whose names are to the grand jury unknown, aided and abetted by each other, did unlawfully, wilfully and knowingly make and cause to be made a firearm, that is, a destructive device, being a bomb, which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, without having complied with the provisions of Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(f) and 5871, and Title 18, United States Code, Section 2.

COUNT SIX

On or about the 11th day of November 1974, at or near the anti-textbook headquarters, Campbells Creek, Kanawha County, West Virginia, and within the Southern District of West Virginia, LARRY ELMER STEVENS, MELVIN D. DICKERSON, DELBERT LEE ROSE and other persons whose names are to the grand jury unknown, aided and abetted by one another, did unlawfully, wilfully and knowingly possess a firearm, that is, a destructive device, being a bomb, which consisted of approximately six (6) sticks of dynamite, one (1) non-electric blasting cap, and five (5) feet of safety fuse, which firearm was not registered to them or to any of them, in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Section 5861(d) and 5861, and Title 18, United States Code, Section 2.

A True Bill,

J. D. THAXTON,
Foreman.

WAYNE A. RICH, JR.
Asst. United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1779

UNITED STATES OF AMERICA,

APPELLEE,

VERSUS

MARVIN HORAN, a/k/a
REVEREND MARVIN HORAN,

APPELLANT.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston, K. K. Hall, District Judge.

(Argued February 2, 1976 Decided Mar. 24, 1976)

Before BRYAN, Senior Circuit Judge, and CRAVEN and RUSSELL, Circuit Judges.

John Boettner, Jr., for Appellant; Wayne A. Rich, Jr., Assistant United States Attorney, (John A. Field, III, United States Attorney, H. Marshall Jarrett and Robert B. Allen, Assistant United States Attorneys and Michael F. Pezzulli, Third Year Law Student, on brief) for Appellee.

PER CURIAM:

After some 24 hours of trial time [extending over four days], the district judge submitted the case to the jury

upon a charge free of error. Some three hours and 19 minutes later, he inquired of the jury if they had reached a verdict, and upon being formed that they had not, the court delivered a form of *Allen* charge approved by us in *United States* v. *Sawyers*, 423 F.2d 1335 (4th Cir. 1970). One hour and nine minutes later the jury returned a verdict of guilty of one count and acquittal of three counts.

Whenever a district judge gives a supplemental instruction on his own motion, we view the danger of invading the province of the jury to be sufficient to require our close scrutiny. In another case, *United States* v. *Stollings*, 501 F.2d 954 (4th Cir. 1974), we warned that the giving of such an instruction two and one-half hours after the beginning of deliberations constituted undue haste. *See also United States* v. *Hogan*, 486 F.2d 222 (4th Cir. 1973). We repeat the admonition.

Upon careful consideration of all the circumstances, we conclude the giving of the supplemental instruction was not an abuse of discretion.

The other assignments of error are without merit.

AFFIRMED.

Supreme Court, U. S.
FILED
JUL 13 1976
MICHAEL RO

No. 75-1530

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARVIN HORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1530

MARVIN HORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that this Court should re-examine the validity of the *Allen* charge.[1]

A six-count indictment filed in the United States District Court for the Southern District of West Virginia charged petitioner and others with conspiracy to destroy a school receiving federal financial assistance, unlawfully manufacturing destructive devices, and destruction of a school, in violation of 18 U.S.C. 371 and 844(f) and 26 U.S.C. 5861(f). Petitioner, named in the conspiracy count and three substantive counts, was convicted of conspiracy and acquitted of the substantive charges. He was sentenced to imprisonment for three years. The court of appeals affirmed *per curiam* (Pet. App. 14a-15a).

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[1] *Allen* v. *United States*, 164 U.S. 492.

Petitioner and his co-defendants were participants in a movement protesting the presence of certain textbooks in the elementary schools of Kanawha County, West Virginia. Petitioner, a self-proclaimed minister, and co-defendant Larry Stevens were leaders of the Campbells Creek Anti-Textbook Headquarters (Tr. 105-107).[2] In October and November 1974, individuals affiliated with the Anti-Textbook Headquarters attempted to destroy several area schools. On October 9, 1974, co-defendant Delbert Lee Rose, on instructions from Stevens, caused extensive damage at the Midway Elementary School by breaking a window, pouring gasoline inside the school, and igniting the gasoline (Tr. 115-116). Thereafter, anti-textbook members, including petitioner, discussed means of preventing the operation of the school by destroying it. One proposal given serious consideration involved placing a sealed five-gallon can of gasoline on the school's furnace boiler, which, when heated, would cause the can to explode (Tr. 117, 119). After petitioner offered to furnish the can, he and Rose proceeded to petitioner's house to pick it up. Pursuant to a prearranged plan designed to conceal from petitioner's wife the actual reason for donating the can, petitioner arrived at his house first. Rose then knocked on the door and, when petitioner and his wife answered, he asked to borrow a can of gasoline on the pretense that his car had run out of gasoline. Petitioner obtained a gasoline can from his back yard and gave it to Rose (Tr. 120-121).

The gasoline can plan was not carried out because Stevens' and Rose gained access to dynamite. At the Anti-Textbook Headquarters, co-defendant Michael

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[2]We are lodging with the Clerk of this Court the five-volume transcript of the trial and sentencing proceedings.

Blankenship and Stevens' wife asked petitioner for twenty dollars, which they intended to use to pay for dynamite. When asked by petitioner why the money was needed, Blankenship told petitioner that it was for "something he wouldn't want to get caught with * * *" (Tr. 302). Petitioner motioned to Blankenship to be silent, handed the money to Mrs. Stevens, and left the room (Tr. 302).

During the late evening hours of October 21, 1974, members of the anti-textbook campaign met at the Campbells Creek headquarters to discuss their protest activities. Petitioner told the others that, according to law, the Midway School was not allowed to operate if it could not provide a hot lunch program. Petitioner stated that if the school cafeteria were destroyed the school would therefore be required to shut down (Tr. 122). After reciting Biblical passages which he regarded as supporting their destructive activities, petitioner commented that he had paid enough taxes in the past decade to own the school and that the members of the protest movement had his permission to do anything they wanted to it (Tr. 123, 218). That same evening Stevens and Melvin Dickerson made a dynamite bomb and Rose hurled it into a classroom of the Midway Elementary School, causing extensive damage to the area in which the explosion occurred (Tr. 124, 129-131, 163-164).

The jury began its deliberations at 9:30 a.m. and continued until noon. It resumed at 1:30 p.m. (Tr. 897, 899, 900). Within the hour the court, over defense objection, determined that it would give a supplemental condensed *Allen* charge in language previously approved by the Fourth Circuit (Tr. 901). The instruction, delivered at about 2:30 p.m., in essence directed the jurors not to surrender an honest conviction, but urged them to reconsider their views in light of opinions held by other

jurors (Tr. 903-905). After receiving the supplemental charge, the jury deliberated for an additional hour and nine minutes before returning its verdict (Tr. 905, 906).

Petitioner contends that this Court should resolve an asserted conflict among the circuits regarding the continued validity of the traditional *Allen* charge. It is true that four courts of appeals, in the exercise of their supervisory powers, have held that the *Allen* charge should be modified.[3] However, none has held that the *Allen* charge in its traditional language, see *Allen* v. *United States*, 164 U.S. 492, violates any constitutionally protected right. Moreover, all of the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict. In these circumstances, the differences among the courts of appeals, reflecting an ongoing re-examination of the precise wording of a proper supplemental instruction, do not presently require the attention of this Court.[4]

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[3]The Fourth Circuit continues to approve the *Allen* charge with minimal modification. *United States* v. *Sawyers*, 423 F. 2d 1335 (C.A. 4). Four other circuits have ordered district courts in their jurisdiction to refrain from using the traditional *Allen* charge. *United States* v. *Angiulo*, 485 F. 2d 37 (C.A. 1); *United States* v. *Thomas*, 449 F. 2d 1177 (C.A.D.C.); *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017.

[4]This Court has recently denied certiorari in several other cases presenting a similar issue. See, *e.g.*, *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, March 22, 1976; *De La Fuente* v. *United States*, No. 75-5310, certiorari denied, November 17, 1975; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.